

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: J 2395/18

TIGER BRANDS LTD t/a

ALBANY BAKERIES

Applicant

And

FOOD AND ALLIED WORKERS UNION OBO

MEMBERS (FAWU)

First Respondent

**THE COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

Second Respondent

S DADABHAI N.O

Third Respondent

Heard: 31 January 2019

Order: 31 January 2019

Date of Reasons: 14 February 2020

JUDGMENT - REASONS FOR ORDER

MAHOSI. J

Introduction

[1] This matter first served before Lagrange, J on 13 September 2018 as an urgent application in terms of which an order was sought in the following terms:

- '1. The non-compliance with the Rules of this Court in respect of times is condoned and the matter is heard as one of urgency;
2. The Commission for Conciliation Mediation and Arbitration lacked the necessary jurisdiction to conciliate the dispute referred to it by the First Respondent under case number HO 2530-18;
3. The dispute referred to the CCMA in terms of case number HO 2530-18 is a dispute involving the interpretation and application of a collective agreement between the Applicant and is not a mutual interest dispute;
4. The First Respondent and its members employed by the Applicant are interdicted and restrained with (or further participating in) any proposed strike action or other form of collective industrial action as contemplated (and actually embarked on) by the First Respondent and its members employed by the Applicant, at the Applicant's various premises throughout the Republic of South Africa;
5. Any strike action or other form of collective industrial action based on the referral made by the First Respondent on its own behalf and on behalf of its members to the CCMA under case number HO 2530-18

as against the Applicant are declared to be unprotected industrial action;

6. Its members be ordered to pay the Applicant's costs of the application, on the scale as between attorney-and-own client, the one paying the others to be absolved;
7. The First Respondent trade union and their officials and office bearers are ordered and directed to ensure that their members are informed of the contents and effect of this Order and further to ensure their member's compliance with the terms of this Order;
8. Service of this Court Order on the Respondents will be effected by;
 - 8.1 Serving the Order on the First Respondent Union by telefax and e-mail;
 - 8.2 Affixing copies of the Order to the main entrances to the Applicant's premises; and
 - 8.3 Handing copies of the Order to the Shop Stewards of the First Respondent trade union and to a spokesperson of non-unionised employees.

[2] On the return date, 09 November 2018, Baloyi AJ by agreement between the parties, extended the *rule nisi* until 31 January 2019 to enable the applicant to file a replying affidavit and the costs were reserved.

[3] On 31 January 2019, the matter served before this Court and after having read the papers and having heard argument, this Court granted the Order confirming the *rule nisi* issued by Lagrange J and further Ordered the First Respondent union (FAWU) to pay the costs of the application.

[4] Subsequent thereto, on 13 October 2019, almost ten months to the day of the order, the Respondents requested reasons for this Court's Order that are provided hereunder.

Background facts

[5] The applicant is a national food producing and supply conglomerate with a number of divisions including Albany Bread which produces bread and other

bread products. It has its head office in Bryanston, Sandton and has divisions nationwide in areas such as Germiston, Sasolburg, Randfontein, Pretoria, Pietermaritzburg, Margate and Cape Town.

[6] The applicant and FAWU entered into a recognition agreement on 20 May 1999 which provided *inter alia* for organizational rights and centralized bargaining for FAWU in the defined bargaining units which FAWU enjoyed majority. These were identified as Bushbuckridge, Umzinto, Margate, Pretoria, Queenstown, Sasolburg, Bellville, Maitland, Germiston, Manna, Pietermaritzburg, Estcourt, Klerksdorp, Kimberly, Louis Trichardt, Phalaborwa, Piet Retief, Ermelo, Secunda and East London¹. According to the applicant, this relationship lasted for two years as most of the bakeries ceased to exist as part of a consolidated effect by the applicant over the years and some were converted into depots.

[7] A dispute arose when on 30 May 2018, FAWU sent a letter to the applicant with the following demands:

- ‘1. We demand total conversion of all labour brokers employed into permanent employment.
2. We demand closure of wage gap (outstanding issue from previous negotiations).
3. We demand that all those acting in vacant positions longer than three months be absorbed automatically.
4. We demand full compliance to the labour laws for code 14 drivers in terms of conditions of employment (benefits, allowances, overtime, Sunday work and public holiday work)
5. We demand full compliance and implementation of National Substantive Agreement in terms of Heat & Heavy duty allowance and Sunday work.
6. We demand 12% wage increase across the board effective from 01 July 2018.

¹ Pleadings bundle at pg 87.

7. We demand a night shift allowance of R 300.
8. We demand a sales commission of ten cents per item sold.
9. We demand production bonus.

NB. The demands and agreement therefore represents all Albany bakeries in the Republic of South Africa where FAWU enjoys majority (50+1) representation as prescribed in the Recognition Agreement of 04 June 1999.'

[8] On 13 June 2018, the applicant responded to the letter and stated *inter alia* that:

- 8.1 In terms of the 1999 recognition agreement, only certain bakeries were party to the recognition agreement and the agreement did not compose all bakeries.
- 8.2 The applicant was of the view that the recognition agreement is stale and is no longer relevant to the current collective bargaining circumstances at the company.
- 8.3 At the time that the agreement was concluded, FAWU *de facto* represented the majority of the employees in the bargaining unit of the listed bakeries which excluded Randfontein and it made practical sense to negotiate terms and conditions for their listed bakeries centrally.
- 8.4 FAWU's membership has vacillated over the years, and has been superseded from time to time by the representation maintained by other trade unions such as ITU, NTM and SACCAWU to an extent that FAWU has not represented the majority of the employees in the bargaining unit at the company, and more particularly for the listed bakeries.
- 8.5 FAWU does not represent a majority of the employees in the bargaining unit in Germiston. FAWU no longer enjoys majority at the Germiston bakery. The applicant takes the view that the recognition agreement has lapsed for Germiston bakery

- 8.6 Circumstances that existed at the time of the conclusion of the recognition agreement for the listed bakeries no longer exists, and by corollary, the validity of the recognition agreement is placed in question.
- 8.7 Each bakery is a business unit operating independently of the other units.
- 8.8 The Randfontein bakery cannot be bound to an agreement that it was never party to.
- 8.10 The proper interpretation of the recognition agreement is that once FAWU membership falls below 50% plus one at a listed bakery, the recognition agreement lapses entirely for that bakery and cannot then be revived should FAWU increase its representation subsequently.
- 8.11 The circumstances no longer support the agreement and therefore the applicant was giving FAWU three months' notice of cancellation of the recognition agreement for any of the bakeries where FAWU maintains that the agreement is still current in terms of clause 19.2 of the agreement.
- 8.12 Furthermore the applicant advised that it would not attend the national collective bargaining meeting scheduled for Cape Town as Cape Town was never covered by the recognition agreement.
- 8.13 Finally the applicant stated that *"in the event that you seek to declare a national dispute in respect of the bakeries that do not participate in the "national collective bargaining meeting"-for the reasons we have set out in our letter, such declaration will be unlawful, and any employee who responds to such declaration by withholding labour in any manner, the company will regard as acting unlawfully, and will subject that employee to the disciplinary process."*

[9] Following the obvious impasse, FAWU referred a dispute to the CCMA under case number GAJB 1206-18 (the first referral) and classified the dispute as "a dispute regarding interpretation/ or Application of a collective Agreement". The parties met for conciliation on 06 June 2018. When conciliation failed, the CCMA issued a certificate of outcome stating that the dispute remains unresolved and that the matter could proceed to arbitration.

- [10] Whilst that matter was still pending, FAWU referred another dispute under case number HO2530-18 (the second referral), the dispute was classified as relating to “mutual interest”. It is clear from the papers that this dispute is similar to the dispute previously referred by FAWU under case number GAJB 166442-17 in which it sought the applicant to extend the current agreement to the Randfontein bakery and all other bakeries where FAWU enjoyed 50% plus 1 representation. It further sought the applicant to bargain centrally. The arbitration award in that matter found that FAWU in fact enjoyed 28% representivity at the Germiston bakery and was only entitled to Section 12 and 13 rights as provided for in the Labour Relations Act² (LRA).
- [11] Upon receipt of the second referral, the applicant informed FAWU that the referral was incorrect and that in fact the dispute remains one of interpretation of a collective agreement. FAWU disagreed and maintained its contention that the dispute was one of mutual interest.
- [12] FAWU advised the applicant that should it fail to meet its demands, and at the lapse of the 30-day period, it would weigh its options within the prescripts of the law, whether to embark on a strike or to follow any other path depending on the mandate they received from its members.
- [13] Viewing this as a threat of industrial action, the applicant approached this Court and sought orders *inter alia*, interdicting the threatened strike.

The applicant's case

- [14] The applicant's case was that the true nature of the dispute between the parties pertains to an interpretation of the recognition agreement. It contended that FAWU was seeking to revive the recognition agreement of 1999.
- [15] The applicant further contended that to the extent that the dispute relates to interpretation or application of a recognition agreement, the CCMA lacks jurisdiction in respect of case number HO2530-18 for the reason that the first referral is pending before the CCMA and that same has not been arbitrated which following the failed conciliation. It argued that FAWU was relying on a collective agreement of 1999 and sought to invoke provisions of that agreement on bakeries in which it enjoys no majority and further wants the

² Act 66 of 1995 as amended.

applicant to bargain with it centrally. The applicant argued that the second referral is a carbon copy of the first referral and contains the same allegations and the same issue for determination or resolution.

- [16] The applicant's apprehension appears from correspondence from FAWU indicating *inter alia*, that "*the strike will teach management to respect the laws of the country*"
- [17] In the applicant's view, the dispute is pending and FAWU should have withdrawn the second referral so that parties could proceed to have the dispute on the interpretation and application of a collective agreement arbitrated. It was further clear to the applicant that FAWU was intent on embarking on strike action, hence it sought an order that the strike be interdicted pending arbitration of the first referral.

FAWU's case.

- [18] FAWU contended that the referrals are distinctly dissimilar. Its case was that the dispute in the second referral is one of mutual interest. Its case was that there is no matter that is pending before the CCMA. Further that, to the extent that a dispute in the first referral was pending, it had not received a notice of set down of the arbitration from the CCMA.
- [19] FAWU further argued that the application before the Court was premature as it had not issued a strike notice which makes the intended strike non-existent. FAWU further argued that there is no strike therefore no dispute pending about the interpretation and/or application of a collective agreement calling for an interdict.
- [20] According to FAWU, the applicant should have waited for the lapse of the 90-day period and if the eventuality was that FAWU issued a strike notice, then the applicant could approach this Court. In its view, the applicant had, by launching this application created a frenzy.
- [21] Furthermore, FAWU contended that the applicant should have exhausted the CCMA's processes before approaching this Court. To this, Mr Mbana argued that the applicant should have after the 90-day period, requested the CCMA to set down the referral for arbitration.

Analysis

- [22] The issue that this Court had to determine was whether there is a live dispute pending between the parties.
- [23] A simple look at the two referrals at the CCMA, evince the fact that the dispute between the parties is one of interpretation and/or application of a collective agreement.
- [24] There was no basis for FAWU to have referred the second dispute in respect of case number HO2530-18 to the CCMA when it was clear that the dispute has not changed and when they could have pursued arbitration. To seek to clothe a dispute with a different cloth does not change the nature thereof. Many concessions were made on the affidavits and on the referrals that the matter is one of interpretation and/or application of a collective agreement. FAWU blew hot and cold, one minute submitting that there is no live and pending dispute and the next passing the responsibility of pursuing arbitration. Therefore, it's submission that the dispute in respect of case number HO2530-18 is that of mutual interest is meritless.
- [25] FAWU made no attempts to resolve the dispute. Instead, it launched a second referral and sought to bank on the lapse of the 90-day period to call its members to a nation-wide strike action when it does not enjoy nation-wide majority. The correspondence annexed to the papers clearly show that it sought to teach the management of the applicant a lesson and bring the applicant's operations to its knees.
- [26] FAWU's submission that there was no strike notice and that the applicant had to await same before approaching this Court when its intentions to embark on a strike were clear is disingenuous. The applicant documented before this Court the loss that it would suffer should the strike not be interdicted.
- [27] It is apparent that there is a live dispute pending between the parties. What is of concern is that instead of pursuing the arbitration, much time has been wasted in opposing this application without merit.
- [28] FAWU could not address the factual concessions made in the papers. Instead, it sought to make unwarranted challenges to the applicant's

representative and make submissions from the bar that really did not support its case.

- [29] FAWU's argument that the applicant should have exhausted the CCMA's processes before approaching this Court is illogical as the applicant did not refer the dispute. It was FAWU that referred the dispute to the CCMA and the referral is an indication that it indeed has an interest which it views as deserving of resolution.

Costs

- [30] When the matter first served before Lagrange, J, the issue of costs was stood to be determined on the return date. Before Baloyi AJ, FAWU sought an indulgence to file an answering affidavit.
- [31] Before this Court, both parties argued for costs on a punitive scale against the other. The applicant, on the one hand, submitted that although there is a bargaining relationship between the parties, that does not apply nationally and FAWU sought to hold the applicant and employees hostage with a threat of a strike. FAWU had not tendered to withdraw the referral which could have influenced the approach taken by the applicant.
- [32] FAWU, on the other hand, submitted that the strike was a 'proposed strike' and did not in fact exist and therefore is it for those reasons that the applicant should be mulcted with a cost order.
- [33] Guided by the principles of law and fairness, this Court has a discretion in awarding costs. In *Zungu v Premier of Kwa Zulu-Natal and Others*³ the Constitutional Court confirmed that the rule of practice that costs follow the result does not apply in labour matters. The Court should seek to strike a fair balance between unduly discouraging parties from approaching the Labour Court to have their disputes dealt with and, on the other hand allowing those parties to bring to this Court or oppose cases that should not have been brought to Court or opposed in the first place.
- [34] This is a case where the Court has to strike a balance, considering the requirements of law and fairness. This Court is loath to award costs where

³ (2018) 39 ILJ 523 (CC) at para 24.

there is an existing relationship between the parties, however this is one of those matters where costs against FAWU are warranted as its persistence in opposing this application was unwarranted when there is a live dispute in the CCMA covering the same grounds that it is now trying to advance in threatening to bring the proposed industrial action within the ambit of protected industrial action. In the premise, the requirements of law and equity prompted this Court to exercise its discretion in favour of the applicant and to order FAWU to pay the applicant's costs.

[35] It was for the above reasons why this Court could see no reason not to confirm the rule nisi issued by Lagrange J as it did.

D. Mahosi

Judge of the Labour Court of South Africa

Appearances

For the Applicant: Advocate W Bekker

Instructed by: Gildenhuys Malatji Incorporated

For the Respondent: Mr M Mbana of FAWU